HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Court's order whether the case is or not approved for reporting)
(Chapter VIII Rule 32 (2) (b)

Description of the Case.

Criminal Appeal No. 1145 of 2001
2148 of 1983 (Old No.)

Nanak Chand Tyagi … Appellant

Versus

State … Respondent

Approved for reporting.

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~~Not approved for reporting.~~

Date of decision 21st September 2004.

Initial of Judge.

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IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Reserved

Criminal Appeal No. 1145 of 2001
2148 of 1983 (Old No.)

Nanak Chand Tyagi
S/o Sri Ram Phal Tyagi
R/o Village Firozpur
P.S. Khekra
District Meerut ... Appellant

Versus

State ... Respondent

Sri Alok Singh, learned senior counsel and sri Tanuj Semwal, Adv. for the appellant
Sri H.C. Pandey, learned Addl. G.A. for the State

Coram:- Hon'ble M.M. Ghildiyal, J.
Hon'ble B.C. Kandpal, J.

(Delivered by Hon'ble B.C. Kandpal, J.)

This criminal appeal arises out against the judgment and order dated 09.09.1983 passed by Sessions Judge, Dehradun in S.T. No. 34 of 1982 State Vs. Nanak Chandra Tyagi convicting the appellant under Section 302 I.P.C. and sentencing him for life imprisonment.

Brief facts of the prosecution case are that Smt. Ram Katori had a daughter, namely, Smt. Raj Rani, who was married with the accused/appellant Nanak Chand Tyagi in the year 1997. The accused/appellant is a resident of Firozpur, District Meerut and was working as constable in U.P. Police and when he was posted at Dehradun, he came in contact with Raj Rani and eventually married her on 30.10.1977 under the Special Marriage Act.

As the accused/appellant and his wife Smt. Raj Rani belong to different castes and the parents of the appellant were not happy with this marriage, therefore, after some time they were strained relations between the husband and the wife. The appellant subsequently started threatening to the deceased–Ram Katori in order to drag money and other properties. The deceased – Ram

Katori initially met his demands but when his demands were more frequent then she started refusing him. The appellant in retaliation started beating Smt. Raj Rani and threatening the old lady (deceased) with dire consequences. The accused/appellant ultimately abandoned his wife Smt. Raj Rani about 1 ½ or 2 years prior to this occurrence forcing her to live with her mother.

The appellant was not satisfied with all this and he continued to visit the house of the deceased - Ram Katori in order to repeat his threats. He also insisted the deceased – Ram Katori to dispose of her property and handover the money to him.

Being fed up with the regular threats extended by the appellant and apprehending imminent danger to her person and property, the deceased - Ram Katori applied for cancellation of her being surety in another case pending against the appellant. This conduct of the deceased - Ram Katori infuriated the accused/appellant who intensified his threats. The deceased - Ram Katori, thereafter made a complaint to S.S.P., Meerut about to conduct of the accused/appellant.

The appellant ultimately resigned from the Police Department.

In the meantime, Smt. Raj Rani also filed a petition against the appellant under Section 27 of the Special Marriage Act for divorce.

The appellant sought several adjournments in that case. ultimately, the court directed to proceed ex-parte and 23.12.1981 was fixed for their purpose. On the date fixed i.e. 23.12.1981 the petition for divorce filed by Smt. Raj Rani was decreed.

Smt. Raj Rani also filed a criminal complaint under Section 125 Cr.P.C. against the appellant for maintenance not only for herself but also for her children. The notices were issued to the appellant for 09.12.1981 and the date was fixed for hearing before A. C.J.M., Dehradun.

On the date fixed i.e. 09.12.1981 Smt. Raj Rani, her mother deceased - Ram Katori and her two brothers Nand Kishore (P.W.1) and Ram Kishore (P.W.2) had come to Dehradun court, but anyhow the case could not be taken up on that day. Hence, all of them returned back to their village.

After reaching to their house, in the after noon, Smt. Raj Rani along with her two brothers and mother (deceased) were sitting on the roof of their house. At about 3:30P.M. the accused/appellant alongwith two accomplices coming on motor cycle from Dehradun side and going upto telephone exchange close by, thereafter returning back towards their house, but the engine was kept running by one of the culprits. The appellant along with another person came towards their house and Smt. Ram Katori apprehending imminent danger from the appellant immediately step down the stairs in order to close the main gate of their house. She thus came in direct confrontation with the appellant and his accomplice at the gate of her house. The accomplice of the appellant caught hold the deceased - Ram Katori and dragged her out of the door and the appellant fired on her with a country made pistol from a close range hitting on her chest, as a result of which she fell down on the ground. The appellant and his accomplice took to her heals, boarded the motor-cycle and escaped towards Dehradun side. The brothers of Smt. Raj Rani came down towards stairs and immediately shifted their mother to Primary Health Centre, Doiwala where she was declared dead. The report of this occurrence was written down by Nand Kishore (P.W.1) at 4:00P.M. at P.S. Doiwala.

The case under Section 302 I.P.C. was registered against the appellant and his two unknown accomplices. The investigation started and Investigating Officer came at the place of the occurrence in order to prepare the site plan. The Investigating Officer recovered 'Tikli' from the scene of the occurrence and prepared the memo about it. The dead body of Ram Katori was sent to mortuary, after the inquest report was prepared.

The autopsy of the deceased Ram Katori was performed on 10.12.1981 at about 4:00P.M. by Dr. V.P. Mishra (P.W.5). the doctor opined that the death was caused due to gun shot injury.

The Investigating Officer recorded the statement of the witnesses and arrested the appellant and his two accomplices. The two accomplices were put up for identification but none could identify them. Therefore, the Final Report was submitted against the appellant by the Investigating Officer after completion of the investigation on 27.02.1982.

After submission of the chargesheet, the accused was committed to the court of Session and the learned Sessions Judge on 01.04.1982 framed the charge against the accused under Section 302 I.P.C.

The accused denied of the charge leveled against them and claimed his trial.

The prosecution in order to support its case produced P.W. 1 Nand Kishore, P.W. 2 Ram Kishore, P.W. 3 Raj Rani, P.W. 4 Sri I.M. Saklani – Sr. Advocate, P.W. 5 Dr. V.P. Mishra, P.W. 6 R.K. Tandon, P.W. 7 M.M. Kala and P.W. 8 Mobin Ahamed.

After the evidence of the prosecution was over, the statement of the accused was recorded under Section 313 Cr.P.C. The appellant did not adduced any evidence in his defence.

Learned trial court, after having perused the entire evidence on record and hearing the learned counsel for the parties, convicted the accused under Sections 302 I.P.C. and sentenced him life imprisonment.

Feeling aggrieved by the aforesaid impugned judgment and order the accused/appellants preferred appeal before the Hon'ble Allahabad High Court, which has been transferred to this Court, for disposal, after creation of Uttaranchal State.

We have heard learned counsel for the parties and perused the record.

The first argument which has been advanced by the learned counsel for the appellant is that the first information report is ante-timed.

Assessment of the evidence shows that P.W.1 Nand Kishore-informant has deposed in his statement, before the Court, that the complainant had already informed the police through phone and when the complainant reached in the hospital, alongwith the victim then the police had reached over there. He has further deposed that the inquest was prepared in his presence in the hospital and thereafter he scribed the report in the hospital.

Likewise, deposition of P.W.3 Raj Rani shows that she has stated that after the occurrence was committed, the complainant informed the police through telephone from Telephone Exchange, and thereafter they took the victim to the hospital where the police arrived and the police prepared the inquest. She has further deposed that after the inquest was prepared her brother Nand Kishore went to lodge the report at police station.

Perusal of the deposition of these two witnesses clearly show that immediately after the occurrence the police was informed through telephone and thereafter the complainant took the victim to the hospital where the police arrived and after the inquest was prepared, the report was reduced in writing and thereafter the same was lodged at police station. Therefore, under these circumstances, it ides not appear to be possible that the report could be lodged at the police station within a period of merely half an hour. The incident is alleged to have taken place at 3:30 p.m. and the report appears to be quite prompt, as the same has been lodged at 4:00 p.m.

Immediately after the occurrence, if the victim was taken to the hospital and the police prepared the inquest over there and thereafter the report was scribed at hospital and then it was lodged at police station, then this sequence will certainly take more than half an our and under these circumstances it cannot be

possible for the complainant to lodge the report at police station at the time as has been alleged by the prosecution i.e. 4:00 p.m. The first information report, under these circumstances, appears to be ante-timed.

The second important aspect in this case is the place of occurrence.

The statement of the Investigating Officer P.W.8 S.I. Mobin Ahmad reveals that no blood was found at the spot. Absence of any blood at the place of occurrence makes the places of occurrence certainly doubtful. Another corroborative circumstance on this point is that the Investigating Officer has not shown the place, from where the 'Tikli' was recovered at the spot. The Investigating Officer has specifically deposed in his statement that he has not shown the place from where the 'Tikli' was recovered at the place of occurrence. A suggestion was put to him that the 'Tikli' was not recovered from the place of occurrence.

The doctor P.W.5 V.P. Mishra has deposed in his deposition before the Court that the death of the deceased was caused due to gun shot injury. It does not appear to be reasonable that the blood would not have oozed out from the injury at the place of the occurrence. Therefore, under these circumstances, the place of occurrence in the present case appears to be doubtful.

Another important point in the present case is that the statements of the material eye witnesses were recorded by the Investigating Officer after about 30 days. The incident is alleged to have taken place on 9.13.1981 while the statements of the witnesses were recorded on 07.01.1982 and this delay in recording the statements of the material eye witnesses has not been explained by the Investigating Officer, even in his deposition before the Court. Perusal of the deposition of the Investigating Officer P.W.8 Mobin Ahmad reveals that he has stated as to statement of Raj Rani was recorded on 07.01.1982. Apart of the statement of Raj Rani, two eye witnesses, namely, Jai Singh and

Satya Prakash, whose names find place in the first information report, could also be recorded by the Investigating Officer on 07.01.1982. As per the deposition of P.W.2 Ram Kishore, his statement u/s 161 Cr.P.C. was also recorded on 07.01.1982. The Investigating Officer has deposed in his cross-examination that he recorded the statement of the complainant on the date of the occurrence and rest of the witnesses could not be made available, therefore, he could not record this statement, but he has not made an entry in his record in the case diary.

It is important to mention here that P.W.1 Nand Kishore is the informant of this case and he has also been produced by the prosecution as an eye witness but this witness has turned hostile. Likewise, P.W.3 Raj Rani, who is the daughter of the deceased Ram Katori, has also been declared hostile by the prosecution, as she has not supported the prosecution case pertaining to the occurrence. The independent witnesses were Jai Singh and Satya Prakash who have not been produced by the prosecution and the statements of Raj Rani as well as these two aforesaid witnesses were recorded by the Investigating Officer after a period of about 30 days, and that too without giving and explanation for this delay. Therefore, the delay in questioning these witnesses by the Investigating Officer is a serious mistake on the part of the prosecution and we thing that this delay in questioning the witnesses by the Investigating Officer seriously hampers the prosecution case.

The record reveals that the prosecution case appears to be highly improbable. The first information report shows that the appellant fired at victim Ram Katori while one of the assailant was catching hold of Ram Katori. P.W.2 Ram Kishore, who has been produced by the prosecution as an eye witness has clearly deposed that the fire was shot as victim Ram Katori from a distance of 5 to 6 feet. In case, if the evidence of P.W.2 Ram Kishore is taken in the light of the medical evidence, then it appears to be quite possible that the fire might have been shot at

from the distance of 5 to 6 feet as no blackening, tattoing or charring was found in the injury of the victim.

Further, it is a case of firing from a distance of 5 to 6 feet then it does not appear to be reasonable and acceptable that the another assailant would catch hold the deceased when his companion is firing at the victim. There would be every possibility that the fire might hit another assailant who was catching hold of the deceased at the time of the occurrence.

The prosecution has specifically come with this case that the appellant fired at the victim and another assailant caught hold of her and this version of the prosecution, under the circumstances of the prosecution case appears to be doubtful.

The most vital point in the prosecution case is that it rests upon the sole testimony of Ram Kishore who has been produced by the prosecution as an eye witness. The presence of this witness appears to be doubtful, in view of the statement of P.W.3 Raj Rani, who is the real sister of P.W.2 and daughter of deceased Ram Katori. P.W.3 Raj Rani has specifically stated in her deposition before the Court that Ram Kishore had gone to market at the time of the occurrence. She has categorically stated in her examination-in-chief that at the time of the occurrence she, her mother (deceased) and her brother Nand Kishore were present on the roof of their house.

As far as the presence of the P.W.1 Nand Kishore is concerned, he has clearly deposed the whatever he has scribed in the first information report that too on the saying of Ram Kishore and he did not seen the actual occurrence of firing.

In case, if the statement of P.W.2 Ram Kishore is taken in to consideration, then it appears that Nanak Chand- appellant fired a shot from his country made pistol causing firearm wound due to which his mother succumbed to injuries. The cross examination of this witness shows that he is posted on work charge in Garhwal Jal Sansthan as Pump Operator at Raiwala and he was, in fact, on leave on the date of the occurrence i.e. 09.12.1981. This witness has stated that he actually moved an application for leave on

08.01.1982 to Junior Engineer, but no application was filed by the prosecution in order to establish the actual presence of this witness at the place of occurrence. There are catena of decisions delivered by the Apex Court observing therein that where the case rests on the sole testimony, then the same has to be scrutinized very carefully and when there are two views possible then the view in favour of the accused, should also be preferred.

We have already observed that the manner of the incident appears to be improbable. Moreover, it is to be seen on the basis of the evidence adduced by the prosecution, whether the witnesses had chance to see the actual occurrence or not. P.W.2 Ram Kishore has deposed that he has seen the entire incident from his roof, while the site plan shows that it is not possible to see the actual occurrence from the roof. Further, in this context it is mentioned here that as per the case of the prosecution P.W.3 Raj Rani was sweing over there while P.W.1 Nand Kishore was knitting sweater, but neither the sewing machine not the knitting machine has been recovered from the place of the occurrence. The Investigating Officer has stated in his deposition that he does not remember as to whether knitting machine was kept over the place of the occurrence or not.

P.W.3 Raj Rani, in her deposition before the Court, has stated that the wall of the roof is 3 to 4 feet high and she, alongwith her brother were sewing and knitting at the floor in a sitting posture. Therefore, under these circumstances, it does not appear to be probable for these witnesses to see the actual occurrence. It is true that the sole witness and the accused were in anmical terms on account of the litigation between them but at the same time this cannot be ignored that this witness is highly interested witness and in view of several inconsistencies in the prosecution case, the presence of this witness on the place of the occurrence does not appear to be reliable and trustworthy. The presence of P.W.2 Ram Kishore who is the sole eye witness in this case, appears to be doubtful in view of this fact that his statement was recorded by police on 07.01.1982 i.e. about 30 days after the

occurrence. He has specifically stated in his deposition before the Court that he remained at his house upto 5-7 days after the occurrence. Therefore, there can't be any reason as to why is statement could not be recorded during those 5-7 days.

Having considered the evidence on record, we are of the view that the prosecution has utterly failed in establishing the guilt of the accused/appellant Nanak Chand Tyagi, beyond reasonable doubt. We are of the view that the impugned judgment and order passed by the Trail Court convicting and sentencing the appellant u/s 302 I.P.C., deserves to be set-aside.

Accordingly the appeal is allowed. The conviction of the appellant Nanak Chand Tyagi u/s 302 I.P.C. and the sentence passed thereon by the Trail Court are set-aside.

(B.C. Kandpal, J.) **(M.M. Ghildiyal, J.)**

September 21, 2004
NCM: